No. 12796

United States Court of Appeals

FOR THE NINTH CIRCUIT

BORK MANUFACTURING CO., INC., a Corporation, and ALVIN BORKIN, an Individual and President of Bork Manufacturing Co., Inc.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Brief and Argument for Petitioners

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

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vs.

FEDERAL TRADE COMMISSION, RESPONDENT.

PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

STATEMENT OF THE FACTS

This case comes before the court on a petition to review a cease and desist order issued against petitioners by the Federal Trade Commission. Sec. 5 of the Federal Trade Commission Act, 52 Stat. Ill., 15 U.S.C.A. Sec. 45, provides for review of the orders of the Federal Trade Commission by the United States Circuit Court of Appeals.

Alvin Borkin did not join in the petition to review.

FINDINGS AS TO THE FACTS AND CONCLUSION

The facts set out in the findings are sufficient to give the court a full understanding of the issues involved. The findings are as follows:

FINDINGS AS TO THE FACTS

Paragraph One: Petitioner, Bork Manufacturing Co., Inc., is a corporation organized and doing business under and

by virtue of the laws of the State of New York, with its principal office and place of business located at 6201 15th Avenue, in the city of Brooklyn, New York. Petitioner, Alvin Borkin, is an individual, and president of said corporate petitioner and controls and directs the business activities, sales policies and practices of the corporate petitioner. The petitioners have acted in conjunction and cooperation with each other in carrying out the acts and practices hereinafter described. Petitioners are now and for more than three years last past have been engaged in the manufacture of devices commonly known as push cards and punch boards, and in the sale and distribution of said devices to manufacturers of, and dealers in, various articles of merchandise in commerce between and among the various States of the United States, and in the District of Columbia.

Petitioners cause and have caused said devices, when sold, to be transported from their place of business in the State of New York to purchasers thereof at their points of location in the various States of the United States other than New York, and in the District of Columbia. There is now and has been for more than three years last past a course of trade in such devices by said petitioners in commerce between and among the various States of the United States and in the District of Columbia.

Paragraph Two: In the course and conduct of their said business as described in Paragraph One hereof, petitioners sell and distribute, and have sold and distributed, to said manufacturers of and dealers in merchandise, push cards and punch boards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Petitioners sell and distribute many kinds of push cards and punch boards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and vary only in detail.

Many of said push cards and punch boards have printed

on the faces thereof certain legends or instructions that explain the manner in which said devices are to be used or may be used in the sale or distribution of various specific articles of merchandise. The prices of the sales on said push cards and punch boards vary in accordance with the individual device. Each purchaser is entitled to one punch or push from the push card or punch board, and when a push or punch is made a disc or printed slip is separated from the push card or punch board and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card and punch board devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards and punch boards the purchasers thereof place instructions or legends which have the same import and meaning as the instructions or legends placed by the petitioners on said push card and punch board devices first hereinabove described. The only use to be made of said push card and punch board devices, and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchaser to sell or distribute said other merchandise by means of lot or chance as hereinabove described.

Paragraph Three: Many persons, firms and corporations who sell and distribute, and have sold and distributed,

candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase and have purchased petitioners' said push card and punch board devices, and pack and assemble and have packed and assembled, assortments comprised of various articles of merchandise together with said push cards and punch board devices. Retail dealers who have purchased said assortments either directly or indirectly have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards and punch boards in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punch boards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

Paragraph Four: The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above described, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or methods in the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push cards and punch board devices by petitioners as described herein supplies to

and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. The petitioners thus supply to, and place in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It Is Ordered that petitioner Bork Manufactuirng Co., Inc., a corporation, and its officers, agents, representatives, and employees, and petitioner Alvin Borkin, individually and as an officer of said corporation, and his agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

By the Commission, Commissioner Mason concurring in the findings as to the facts and conclusion, but not concurring in the form of order to cease and desist, for the reasons stated in his opinion concurring in part and dissenting in part in Docket 5203—Worthmore Sales Company.

STATUTORY PROVISIONS UNDER WHICH THESE PROCEEDINGS ARE PROSECUTED

The petition filed in this Court alleges that petitioners do business within the jurisdiction of this Court.

The Federal Trade Commission Act provides in part as follows:

"Sec. 5. UNFAIR METHODS OF COMPETITION OR DECEPTIVE ACTS OR PRACTICES. COMPLAINTS, FINDINGS, AND ORDERS OF COMMISSION. APPEALS. SERVICE. PENALTIES. (52 Stat. 111; 15 U.S.C.A., sec. 45.)

"Sec. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers, subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938,[3] and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair methods of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint.

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days' from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed."

STATEMENT OF THE CASE

The only question presented herein is, does the Federal Trade Commission have jurisdiction to restrain petitioners from shipping punch boards in interstate commerce which are to be used or may be used to distribute merchandise.

ASSIGNMENT OF ERRORS

I.

The Federal Trade Commission does not have jurisdiction to restrain Petitioners from shipping punch boards in interstate commerce.

II.

The order issued herein is contrary to and against law.

ARGUMENT

THE RULE OF STRICT CONSTRUCTION MUST BE APPLIED TO THE FEDERAL TRADE COMMISSION ACT.

The Federal Trade Commission being a statutory creation, the basic and underlying problem throughout the entire consideration of this case is one of statutory construction. When a court is confronted with the duty of constructing a statute, the first question to be resolved is whether the enactment in question is of the type that is to be strictly construed. The United States Supreme Court has answered this question as to the enactment involved herein in at least three cases; *Federal Trade Commission vs. Bunte Bros.,* 312 U. S. 349, *Federal Trade Commission vs. Raladam Co.,* 283 U. S. 643, and the *Federal Trade Commission v. Klesner,* 280 U.S. 19. In each of these cases it was held that the Federal Trade Commission Act is within the rule of strict construction, in fact the very strictest construction must be applied. The Supreme Court in the *Klesner* case, *supra,* said:

> "* * * the scope of its authority is strictly limited."

This brief statement is made for two purposes: first, to establish at the outset that by law as laid down by the Supreme Court the Federal Trade Commission Act is controlled, comes within, and is governed by the rule of law which is known as the rule of strict construction, second, that at all times hereinafter this principle of construction should be constantly born in mind and applied during the entire deliberation of this case.

UNDER WHAT PRINCIPLE OF LAW IS THE COMMISSION PROCEEDING.

In the face of the Supreme Court's holding in the *Bunte* case, *infra,* it is impossible for the petitioner to determine or comprehend the theory upon which the commission relies to sustain its jurisdiction to issue such a broad and all inclusive cease and desist order as has been issued by it herein.

To present to the court the reason why petitioner is in the above dilemma it is necessary to first point out the holding in the *Brewer* case, *supra;* second, to point out the theory found in the finding of facts; third, to point out the all inclusiveness of the order and, finally, to discuss a portion of the Federal Trade Commission Act.

The Supreme Court in the *Bunte* case, *supra,* held that intrastate transactions are not within the jurisdiction of the Federal Trade Commission Act. In other words, only transactions in interstate commerce are within the purview of the Commission's jurisdiction.

This holding is very vital because the petitioner ships punch boards to people who use them exclusively in intrastate commerce to distribute merchandise.

In its findings, the Commission relies upon the theory that:

> "Petitioner supplies to, and places in the hands of persons, firms and corporations the means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act." (Rec. 22).

This establishes beyond doubt that the only theory upon which the Commission is relying to sustain its jurisdiction is that "one who furnishes or supplies the means of and instrumentalities for, engaging in unfair cuts and practices which are within the corrective power of the commission is himself violating the act."

Under this theory, as the intrastate use of punch boards to distribute merchandise is not within the purview of the Federal Trade Commission Act, the Commission does not have power to restrain the petitioner from shipping punch boards to people who use them exclusively in intrastate transactions, even though the punch boards are used to distribute merchandise. To illustrate: a tavern located in a different state buys punch boards from the petitioner. The petitioner ships the boards in interstate commerce to the tavern and the tavern uses the punch boards to distribute merchandise. In so doing the tavern is not violating the Federal Trade Commission Act. Therefore, under the principle of law set out in the findings the Commission has no power to restrain the petitioners from shipping or distributing punch boards to the tavern nor to other places under like circumstances.

Notwithstanding this, the order restrains the petitioners from shipping punch boards to people who use them to distribute merchandise in a manner which is not within the purview of the act.

From this it is obvious that the order to cease and desist is much broader than the Commission's theory. For this reason the theory as set out in the findings, even if the theory were sound which the petitioner contends is not so, does not sustain the issuing of such an all inclusive order.

The order is as follows:

> "* * * do forthwith cease and desist from: Selling or distribution in commerce, as "Commerce" is defined in the Federal Trade Commission Act, punch boards, push cards, or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme."

This order prohibits the petitioners from shipping to people who are going to use them to distribute merchandise regard-

less of whether or not the distribution of the merchandise by the boards is in violation of the Federal Trade Commission Act. Again we say, the order is much broader than the theory set out in the findings and is contrary to the holding in the *Bunte,* case, *supra.* That is to say, that the order cannot be sustained on the theory set out in the findings in the face of the holding in the *Bunte* case.

To be within the theory set out in the findings the order would have to read somewhat like this:

> "Petitioner must forthwith cease and desist from: Selling or distributing in commerce, as "Commerce" is defined in the Federal Trade Commission Act, punch boards, push cards, which are to be used to engage in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act."

From the above it is self-evident why the petitioner cannot comprehend what theory or principle of law the Commission is relying upon to sustain its jurisdiction to issue such a broad and all inclusive order.

The following discussion of the Federal Trade Commission Act will show why the petitioner is unable to determine from the act itself what theory the Commission is proceeding upon.

The act provides in part as follows to-wit:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are hereby declared unlawful."

The question under this portion of the act is: Are the acts complained of herein (1) unfair methods of competition, (2) deceptive acts or practices, (3) unfair acts or practices?

The Supreme Court in the case of *Federal Trade Commision vs. Raladam Co.,* 283 U. S. 643; 51 Sup. Ct. 335, held

that injury to competitors is an essential and indispensible element in characterizing any method, act or practice as an "unfair method of competition." Therefore, as the Commission admits that the petitioners' acts and practices do not in any shape or form directly or indirectly injure their competitor it is obvious that petitioners' conduct is not an unfair method of competition.

Petitioners' acts are not within the second category because the commission makes no claim that they are deceptive.

The remaining question under this portion of the act is, are the acts and practices of petitioners unfair within the meaning of that word as it is used in the Federal Trade Commission Act?

If there is to be any consistency in the interpretation of the word "unfair" as Congress used this word in the statute creating the Federal Trade Commission there must be some criterion established to guide courts in their application of this word, "unfair," to the different and various methods, acts and practices which they are called upon to either include or exclude from the corrective power of the Commission.

The very nature of the Federal Trade Commission Act requires that the criterion to be adopted must limit the meaning of the word "unfair" to methods, acts and practices which are either unfair to "competitors," "purchasers," or both. The Federal Trade Commission is certainly a *trade* commission; therefore, its functions should and must be confined strictly within the limits of trade, that is to "unfair *trade* practices, acts, or methods." Practices, acts, or methods which may be unfair in other respects cannot be brought within the corrective jurisdiction of the Federal Trade Commission. Therefore, among other elements, this criterion should limit the meaning of the word "unfair" as the word is used in the Federal Trade Commission Act to methods, acts or practices which are either unfair to "competitors" or unfair to "purchasers" or both. Reason and logic compel the insertion in the criterion of such a standard.

The testimony of the last Commissioner Davis given before the House Committee at the time the Commission was advocating the adoption of the Wheeler Lea Amendment substantiates the above contentions. He testified in part as follows:

> (Hearings on H.R. 3143, 75th Cong., 1st Sess. pp. 6, 9, and 14:) Commissioner Davis
>
> "We say, Congressman Chapman, that there is no distinction between an unfair *trade* pratice or an unfair or deceptive act; but it is the words 'method of competition' that they play upon all the time—that we must prove that there is competition." (Italics provided).
>
> "* * * For instance, why does a man engage in an unfair practice? He does it in order to get business; in order to deceive the public and induce sales; in order to get an advantage over his competitors."
>
> * * * * *
>
> "People engaged in trade deal with the consuming public, and whenever they engage in unfair or deceptive practice, then it is not only unfair to their competitors, but it is unfair to the public, either way you put it, and if it is unfair to the public, *if it decives the public and induces the public to trade* with them when they would not do it in the absence of those *false representations,* or *unfair trade practices,* it is inevitable that it is also unfair to competitors." (Italics provided).

Commissioner Davis' above quoted statements show that the sole object of the 1938 Amendment, instigated by the Commission, was to reach, *without proving the element of competition,* those cases wherein a merchant or trader was seeking to secure orders for his products in interstate com-

merce by using "unfair" or "deceptive" "acts" or "practices." The sole object of the amendment was to make it possible to reach cases of this type by proving through substantial evidence that the respondent sought or received orders through the medium of interstate commercial acts or practices which are unfair or deceptive to purchasers or prospective purchasers of things marketed, or sought to be marketed, by the merchant or trader in interstate commerce.

In the case of *Pep Boys—Manny, Moe, and Jack, Inc., vs. Federal Trade Commission,* 122 F. (2) 158, the court substantiates petitioners contention that the word "unfair" is confined to such practices which are either unfair to consumers or competitors. On this point the court said:

> "The failure to mention competition in the later phrase shows a legislative intent to remove the procedural requirement set up in the *Raladam* case and the Commission can now center its attention on the *direct protection of the consumer* where formerly it could protect him only indirectly through the protection of the competitor." (Italics provided).

By the standards of such a criterion petitioners' methods, acts, and practices are eliminated from the purview of the Federal Trade Commission's corrective action because, as has been said before, petitioners' acts and practices complained of herein are not, and the Commission makes no claim that they are, unfair to petitioners' competitors or unfair to petitioners' purchasers or purchasers of petitioner products. Lacking these two essential and indispensible elements, the petitioners' acts and practices are not unfair within the meaning and intent of the Federal Trade Commission Act. In other words, if any act or practice is not unfair either to competitors or to purchasers of petitioners' merchandise, the complained of methods, acts, or practices should not be held to be unfair within the intent and meaning of the Federal Trade Commission Act. As the petitioners' acts according to the

above discussion are not unfair within the meaning and intent of the Federal Trade Commission Act, the petitioner cannot comprehend, upon what theory or principle of law the commission relies in determining what acts are or are not within the Commission's corrective jurisdiction.

It should be noted that by the follwing portion of section 5 of the act:

> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from *using* unfair methods or competition in commerce and unfair or deceptive acts or practices in commerce." (Italics provided).

Congress expressly limited, confined, and cirmumscribed the Commission's power to the field and activity of *using* unfair acts and practices or unfair methods of competition in commerce. The *using* of an act, practice, or method means that the act, practice, or method complained of is used as a means to an end and is not the end itself. The Commission makes no contention that the petitioners are *using* any acts, methods or practices.

If the word "in" as used in the Federal Trade Commission Act means only "in" and not "Affecting" the word "using" as it appears in the same act must not be construed to mean "placing in the hands of others." The word "using" has its limited meaning the same as the word "in" has its limited meaning.

As this court in the case of *California Rice Industries vs. Federal Trade Commission* 102 F (2) 716 and the Supreme Court in the case of *Bunte Bros.,* 312 U.S. 349, said "in" can not be construed as including, "affecting." This Court and the Supreme Court, to be consistent, must adopt the same strictness in construing the word *"using"* as they did in construing the word "in."

Petitioners have shown that the complained of acts herein are not unfair methods, acts, or practices within the intent

and meaning of the Federal Trade Commission Act; also, the petitioners have established that the said methods, acts, or practices are not being used by petitioners.

The Commission in this proceeding is asking the court to read into the Federal Trade Commission Act words and meanings that are not there and which were never intended to be there. This, the Supreme Court in the *Bunte* case, and this Court in the case of *California Rice Industries, supra,* said cannot be done.

It should be apparent that petitioners do *not* in any way "*use*" (as distinguished from "aiding and abetting, inducing and procuring") unfair methods of competition in commerce and unfair or deceptive acts in commerce either to their competitors or the purchasing public. Likewise, in no way do petitioners "furnish another with the means of consummating a fraud," and, as has been pointed out, the complained of acts of petitioners do not give petitioners any unfair advantage over their competitors nor do they cast upon their competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt. Therefore, it would seem that none of these complained of acts come within the corrective power of the Federal Trade Commission as the Petitioners have shown that (1) petitioners' acts are not unfair methods of competition; (2) they are not deceptive; (3) they are not unfair; (4) petitioners are not *using* any methods, acts or practices, it is obvious that the petitioner does not know upon what principle of law the commission is relying upon.

THE CASE OF SCIENTIFIC MANUFACTURING COMPANY, INC.

In *Scientific Manufacturing Company, Inc. vs. Federal Trade Commission,* 124 F. (2) 640, the United States Circuit Court of Appeals for the third Circuit decided all of the issues raised in the case at bar in favor of the petitioners and against the Commission.

In that case the complaint issued by the Commission, Docket No. 3874, (32 Federal Trade Commission Decisions 493) (1941) alleged that Scientific Manufacturing Company, Inc., sold and distributed pamphlets principally through manufacturers of cooking utensils who were engaged in competition in commerce with manufacturers of aluminum ware. These pamphlets contained false and derogatory utterances concerning the use of aluminum in cooking utensils. The Commission charged that the act and practices of Scientific Manufacturing Company, Inc., constituted unfair methods of competition and unfair and deceptive acts and practices in commerce.

The Commission found the statements contained in the pamphlets were false and injurious to the aluminum industry and further found that the pamphlets supplied as "instrumentality by means of which uninformed or unscrupulous manufacturers, distributors, dealers and salesmen may deceive or mislead members of the purchasing public, and induce them to purchase utensils made from materials other than aluminum," and found the respondent guilty of "unfair and deceptive acts and practices in commerce." The Commission issued its cease and desist order and Scientific Manufacturing Company, Inc., petitioned the Circuit Court of Appeals for the Third Circuit, asking that the order be set aside.

In this case the court said:

> "The Commission contends that its jurisdiction in the circumstances shown derives from the amendment of March 21, 1938, (c. 49 Sec. 5 (a), 52 Stat. 111, 15 U.S.C.A. sec. 45 (a)) which enlarged the original Federal Trade Commission Act by adding thereto a denouncement of "unfair or deceptive acts or practices in commerce" and by correspondingly empowering and directing the Commission to prevent the use of such acts or practices. From this, the Commission

argues that the petitioners, being commercially engaged in an interstate business (the sale and distribution of pamphlets) are amenable to the Commission's interdictions when any of their acts or practices are found by the Commission to be unfair or deceptive in respect of some article of commerce in an *unrelated trade and notwithstanding such acts or practices are neither unfair nor deceptive in respect of the petitioners' trade in interstate commerce. * * * Obviously, a grant of power so vast is not to be accorded an administrative body except upon plain legislative direction within constitutional bounds. This brings us then to the matter of congressional intent for first consideration.*" (Italics provided).

Without equivocation the Third Circuit thus announced the principle of law that when petitioners' acts and practices are neither unfair nor deceptive in respect of the petitioners' trade in interstate commerce, the Commission has no jurisdiction to issue a cease and desist order. It is not claimed nor does the Commission contend or is it alleged or found that the petioners' acts complained of are "unfair or deceptive" in respect of the petitioners' trade.

Likewise, the court without equivocation applies the rule of "strict construction" to the Federal Trade Commission Act. Accordingly, no court can construe the Federal Trade Commission Act so as to rule that the Federal Trade Commission has power to restrain methods, acts, and practices which are not unfair or deceptive in respect of the petitioners' trade in interstate commerce. Such a power must have a plain legislative direction within constitutional bounds. This essential direction the court holds is not included within the statute creating the Federal Trade Commission.

The court also said:

"None the less, it was still the unfair acts of

> traders in the affected commerce that the Commission was empowered to enjoin * * * But the restrainable acts or practices in commerce continued to be such as are performed or perpetrated in the trade affected by the offenses, whether or not there is competition. In short, the Commission's intervention is limited to acts or practices in the affected trade. If the amendment were given any broader scope, the Act would relate to far more than trade practices * * *"

The power granted to the Commission must have some limit. The petitioners feel that the limits placed on the Commission by this case is logical and does not cramp the meaning of the Federal Trade Commission Act. Feeling this way the petitioners urge this Court to adpot this limitation and apply it to the case at bar.

THE CASE OF CHARLES A. BREWER AND SONS VS. FEDERAL TRADE COMMISSION.

The United States Circuit Court of Appeals for the Sixth Circuit in the case of *Charles A. Brewer & Sons,* 158 F (2) 74, sustained an order issued by the Federal Trade Commission identical with the order issued against these petitioners. The crux of the ruling in the case is set out clearly in the following paragraph:

> "For the reasons hereinafter appearing, we have reached the conclusion that, in thus aiding and abetting, inducing and procuring manufacturers and wholesale and retail dealers in merchandise to use unfair or deceptive acts or practices and unfair methods of competition, Charles A. Brewer and Son, though manufacturing no merchandise except the lottery devices which they ship in interstate commerce, fall within the restraining power of the Federal Trade Commission Act. (52 Stat. 111.)"

By so holding the Sixth Circuit construes this part of the Federal Trade Commission Act:

> "The commission is hereby empowered and directed to prevent persons, partnerships, and corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts in commerce."

to include the

> "aiding and abetting, inducing and procuring manufacturers and wholesale and retail dealers in merchandise to use unfair or deceptive acts or practices and unfair methods of competition, even though said acts or practices and unfair methods are intrastate."

In so construing the act the court ignored the rule of construction announced by the Supreme Court in the *Bunte* case, *supra,* and by this court in the case of *California Rice Industry.* The court announced this principle of law without referring to the Federal Trade Commission Act, the above two cases or any rules of statutory construction.

In all of the cases cited in the decision in the *Brewer* case to sustain the holding therein that *using* can be read as meaning "aiding and abetting, inducing and procuring" are cases where the one proceeded against was *using* a method in interstate commerce which *cast upon their competitors the burden of the loss of business unless they descended to a practice which they were under a powerful moral compulsion not to adopt.* Cases wherein this is the only principle of law involved are not authority nor precedent for the holding that *using* can be read as meaning "aiding and abetting, inducing and procuring." Also, they are not authority nor precedent for holding that the complained of acts of the petitioners are within the purview of the Federal Trade Commission Act.

The first case cited in the *Brewer* case to sustain this broad interpretation of the word "using" is the case of *Fed-*

eral Trade Commission vs. Winsted Hosiery Company, 258 U. S. 483. This case is not in point nor does it contain any comment or any holding which in any way can be construed to justify the Sixth Circuit in holding that the word *using* can be interpreted to mean "aiding and abetting, inducing and procuring." The following discussion of the *Winsted* case is limited to its application in the *Brewer* case.

In passing, the petitioner wishes to point out that the *Winsted* case comes within the rule of law announced in the case of *Scientific Manufacturing Company vs. Federal Trade Commission, supra,* and certainly it is not *contra* to it for all of the evil results of the use of such methods by the Winsted Company were unfair in respect of its trade in interstate commerce. The case at bar does not.

The *Winsted* case, *supra,* also comes within the criterion that the method, act or practice must be either unfair to competitors or purchasers, because the method used by the Winsted Hosiery Company, *supra,* was both unfair to competitors and to purchasers. Petitioners acts are not unfair to either.

The Winsted Hosiery Company made a product consisting of wool and cotton which they mislabeled as all wool. This cast upon Winsted Company's competitors the burden of loss of business unless they descended to a practice which they were under a powerful moral compulsion not to adopt. This was the unfair method of competition used by the company and the Commission restrained them, not from shipping this product in commerce, but from using the method of misbranding it. The Supreme Court, in discussing the effect of this practice, said:

> "And they (the facts in the case) show also that the *practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their products truthfully. For when misbranded goods attract custo-*

mers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods." (Italics provided).

The court says further:

> "The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. *That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.*" (Italics supplied).

Thus the Supreme Court holds that the practice of misbranding is an unfair method of competition upon and for the sole reason that, as stated by the court:

> "For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the *producer* of truthfully marked goods." (Italics provided).

This shows that the essence of the holding in the *Winsted* case, *supra,* is that the honest *manufacturer's* business suffers when his competitor places in the hands of another his dishonest goods, this casts upon its competitors the burden of loss of business unless they descended to a practice which they were under a powerful moral compulsion not to adopt.

It will be noted that the Sixth Circuit Court, in its opinion in the *Brewer* case, when quoting from the *Winsted* case, *supra,* italicized the following sentence contained in the quote:

> "That a person is a wrongdoer who so furnishes

another with the means of consummating a fraud has long been a part of the law of unfair competition."

When the Circuit Court plucked this sentence out of the quoted portions of the *Winsted* case and isolated it from all the rest of the Supreme Court opinion it is safe to assume that the court in deciding the *Brewer* case, concluded that this sentence established the principle of law that placing in the hands of others the means by which the Federal Trade Commission Act is violated is an unfair act within the corrective power of the Federal Trade Commission.

The Court again, after citing another case, says:

> "The opinion recognizes the principle of the *Winsted Hosiery Company* case, *supra,* that wrongfully furnishes another with the means of consummating a fraud is an established part of the law of unfair competition."

The Commission also contends that this sentence settles all of the issues in the case at bar adversely to the petitioners.

The sentence in the *Winsted* case, *supra,* relied upon by the Sixth Circuit Court does not say, as the court assumes and interprets it to say, "that a person is a wrongdoer who * * * furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition."

Where the petitioners have placed the asterisks, the Supreme Court has placed the word "so." Therefore, the sentence reads "who so furnishes" which means who so furnishes the means to commit a fraud by which the one who furnishes the means of perpetrating the fraud thereby has an unfair advantage over his competitors in interstate commerce, and, also, casts upon its competitors the burden of loss of interstate business unless they descended to a practice which they are under a powerful moral compulsion not to adopt. The petitioners do not *"so furnish"* any such means because, as has

been pointed out, the acts of petitioners complained of do not give petitioners any unfair advantage over their competitors, nor do the petitioners cast upon its competitors the burden of loss of business unless they descended to a practice which they are under a powerful moral compulsion not to adopt.

In making such a broad interpretation of this sentence the Court of Appeals for the Sixth Circuit, and the Federal Trade Commission are clearly in error. The fallacy of such a broad interpretation of this sentence will appear self evident when the facts and principles of law involved in the *Winsted* case, *supra,* are compared with the facts of the case at bar.

The method used by the Winsted Hosiery Company, *supra,* were held to be within the interdiction of the Federal Trade Commission on the sole and only ground, that the Winsted Company was using "an unfair method of competition in interstate commerce, because by using said methods the Winsted Company had an unfair advantage over all of its competitors in interstate commerce. In the absence of this condition the Federal Trade Commission has no jurisdiction.

This condition is certainly not present in the present case. Petitioners do not have any unfair advantage over their competitors. This should be conclusive of the case.

This sentence under discussion cannot be read to mean that one who furnishes another with a punch board which is used to distribute merchandise, *not the merchandise of the one who furnishes the punch boards* but the merchandise of the user thereof, comes within the grant of power contained in the following portion of the Federal Trade Commission Act:

> "The commission is hereby empowered and directed to prevent persons, partnerships, and corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts in commerce."

The Winsted Company furnished the entire means of consummating the fraud while the petitioners only furnish

a part of the assortment, the punch board; the merchandise is furnished by another.

Petitioners are not charged with using an unfair method of competition. The rule of law announced in the disputed sentence is limited to the law applicable to such a method. A principle of law exclusively applicable to the law of unfair methods of competition is not applicable to some other act or practice.

The Supreme Court in the *Winsted* case cites the case of *Coca Cola Company vs. Gay-Ola Company,* 200 Fed. 120 (C.C. A. 6) in support of its holding. This case is one wherein the conduct of the wrongdoer was leading purchasers to believe that they were purchasing Coca Cola's product when in fact they were acquiring the product of the Gay-Ola Company. In this case the Sixth Circuit Court laid down the same rule as is laid down in the *Winsted* case. This case did not involve the Federal Trade Commission or its power. It was a case of just "unfair competition" but it did turn on the point that the wrongdoer had an unfair advantage over his competitors in interstate commerce, which petitioners contend is essential to the application of this rule of law.

In addition to the element of unfair advantage by a wrongdoer over his competitors, the proceeding in the *Winsted* case, *supra,* was against the *using of the method* not the *stopping of the shipping of merchandise.*

What has been said about the *Winsted* case, *supra,* applies with equal force to the other two cases, *Chicago Silk Company vs. Federal Trade Commission,* 90 F. (2) 689, and *Deer vs. Federal Trade Commission,* 152 F. (2) 65, which are cited in the *Brewer* case, in support of the same proposition. Not one of the above cases is in point herein because in each of them the methods, acts and practices proceeded against were unfair methods of competition. The petitioners are not charged with using such a method.

After stating that both *Raladam* cases were before the

Wheeler Lea Amendment, the court says, speaking of the Amendment:

> "This makes it now necessary that effect on competition be shown. *For discussion of the effect of this amendment see* Pep Boys—Manny, Moe, and Jack, Inc., vs. Federal Trade Commission, 122 F. (2) 158, 161 (C.C.A. 3); Scientific Manufacturing Company vs. Federal Trade Commission, 124 F. (2) 640, 643 (C.C.A. 3)." (Italics supplied.)

The petitioners cite both of these cases in support of their case. As shown above the *Pep Boys—Manny, Moe, and Jack, Inc., vs. Federal Trade Commission,* holds, and for emphasis the following is repeated, quoting from the case of *Pep Boys—Manny, Moe, and Jack, Inc., vs. Federal Trade Commission, supra*:

> "The failure to mention competition in the later phrase shows a legislative intent to remove the procedural requirement set up in the Raladam case and the Commission can now center its attention on the *direct protection of the consumer* where formerly it could protect him only indirectly through the protection of the competitor." (Italics provided).

The discussion as to the effect of the Amendment in the *Scientific Manufacturing Company, supra,* is directly in conflict with the holding in the *Brewer* case, wherein it is cited. If the Sixth Circuit Court had followed what was said in these cases after having cited them with approval, the court would have decided the *Brewer* case against the Commission.

Next, the court in the *Brewer* case cites several cases decided by the Seventh Circuit. Unfair methods of competition are not in point in the *Brewer* case because they have (1) used a method; (2) the method used was unfair to competi-

tors. These cases are not authority or precedent for holding that "aiding and abetting, inducing and procuring others," is within the Federal Trade Commission Act. In all of these cases the persons proceeded against were *using* an unfair method of competition in commerce because in each case the Federal Trade Commission had made a finding in effect that their competitors were forced to use a method or practice which they were under a powerful moral compulsion not to use, or suffer a loss of substantial trade. There is no such finding made in the case at bar. First, the petitioners' acts are not being *used* nor do the petitioners cast upon their competition the burden of loss of business unless they descend to a practice which they are under a powerful moral compulsion not to adopt.

It is now necessary to first determine if that portion of the opinion in the *Modernistic Candies* relied upon not only by the Commission, but also, by the Sixth Circuit Court of Appeals is dictum, and then it must be determined whether or not the principle announced therein is or is not in conformity with the law as announced by the Supreme Court. The portion of the opinion in the *Modernistic* case relied upon by the Sixth Circuit, under discussion here is as follows:

> "It is clear that the Federal Trade Commission has the power to eradicate merchandising by gambling in interstate commerce. We think the Commission also has the power to prohibit the distribution in interstate commerce of devices intended to aid and encourage merchandising by gambling. The gamblers and those who deliberately and designedly aid and abet them are both engaged in practices contrary to public policy. Merchandising by gambling should not be divided into isolated acts, which appear innocent when examined separately. This unfair practice should be viewed as a whole. If the Federal Trade Commmission is to police merchandising by gambling, it must police those

who designedly and *deliberately aid and abet this practice. We think the Commission has such power.*"

The following analysis of the issues presented in the *Modernistic* case will make it self-evident that the above quoted portion of the opinion is dictum.

The Modernistic Candies Company was engaged in the business of selling gum. This is of vital importance in this analysis. The company was not engaged in selling any kind of gambling device independent or separate from its gum. The act or practice proceeded against was the act and practice of placing balls of gum in holes in a laminated board. This contrivance was sold in interstate commerce and when used, customers would buy Modernistic's gum by pushing out from one of the holes a concealed ball of gum. Some of the balls were winners and prizes were awarded to the people who were lucky enough to punch out a winning ball of gum. In this case the Modernistic Candies was clearly using the chance device to sell its gum. This places this case in the category with all of the other chance cases wherein the party proceeded against was *using* a chance device to sell their merchandise. This practice of selling one's merchandise in interstate commerce accompanied with a chance device has been held to be unfair to competitors and therefore, because such practice is unfair to competitors and for this reason alone this practice has been held to be within the meaning of the Federal Trade Commission Act. The issues involved therein were limited strictly to this issue.

As the only issue in the case was, does the practice of selling assortments consisting of merchandise and a chance device by a person engaged in the selling of merchandise, but not engaged in the business of selling chance devices otherwise than with his merchandise come within the interdiction of the Federal Trade Commission, any and all statements or comments made by the court in this case concerning the legal effect of the mere selling of a chance device which is to be used for the purpose of distributing merchandise is mere dictum of the highest type.

If the issue of whether or not the furnishing of a chance device is an unfair act within the meaning of the Federal Trade Commission had been presented in this *Modernistic* case the attorney for the petitioner therein would have cited the *Bunte* case, *supra*; and the Seventh Circuit Court in the face of what the Supreme Court held in that case would not have said:

> "We think the Commission also has the power to prohibit the distinction in interstate commerce of devices intended to aid and encourage merchandising by gambling."

nor would the court have said:

> "If the Federal Trade Commission is to police merchandising by gambling, it must police those who designedly and deliberately aid and abet this practice. We think the commission has such power."

Petitioners make this statement because the Supreme Court in the *Bunte* case held unequivocally that the Federal Trade Commission is *not* to police the intrastate merchandising by gambling.

The statement is not only dictum but the principle of law announced therein is not sound. There is no sound principle of statutory construction that in an act creating an administrative agency the words, "using an unfair method of competition and unfair or deceptive acts or practices" can be construed to include the furnishing of just some of the means by which others violate the act.

The decision in the *Brewer* case is unsound because it is predicated upon the following unsound principle of law announced in the dictum in the *Modernistic* case, *supra,* to wit:

> "If the Federal Trade Commission is to police merchandising by gambling, it must police those who

designedly and deliberately aid and abet this practice. We think the commission has such power."

This principle of law is unsound because the Supreme Court in the *Bunte* case, *supra,* held that the Commission has no power to police merchandising by gambling.

The following cases cited in the *Brewer* opinion: *Ostler Candy Co. v. Federal Trade Commission,* 106 F. (2) 962; *Federal Trade Commission v. F. A. Martoccio Co.*, 87 F. (2) 561; *Deer v. Federal Trade Commission,* 152 F. (2) 65; and *Parke, Austin & Lipscomb v. Federal Trade Commission,* 142 F. (2) 437, cited by the Sixth Circuit, are all in the same category as the cases cited from the Seventh Circuit. All of these cases involved *only* and *solely* the principle of law that the facts as found by the Commission in each of the cases constituted the *using* in interstate commerce of "an unfair method of competition." In as much as the Commission admits that petitioners are not using an unfair method of competition, these cases have no bearing upon the issues joined in the *Brewer* case or in the case at bar. They certainly are not authority or precedent for holding that "in" can be read as aiding and abetting, inducing or procuring.

The offhand treatment of the case of *Federal Trade Commission vs. Bunte Brothers, Inc.,* 312 U.S. 349 by the Sixth Circuit Court in the closing part of its opinion in the *Brewer* case convinces the petitioners that the Sixth Circuit did not understand the important bearing the *Bunte* case has upon the issues raised in the *Brewer* case and in the case at bar.

From what has been said heretofore about the *Bunte* case and the *Winsted* case, it is self-evident that the petitioners contend that the *Bunte* case is of vital importance in at least two aspects in deciding a case involving the issues raised in the case at bar; first, the *Bunte* case holds that the Federal Trade Commission Act must be strictly construed; second, that intrastate transactions are not in the purview

of the Federal Trade Commission Act; and that petitioners further contend that the *Winsted* case is of no importance to the resolving of such issues; while on the other hand, the Sixth Circuit Court holds that the *Bunte* case is not of importance and that the *Winsted* case is absolutely controlling.

What the petitioners are hoping to do is to convince this court that their contention is correct and the Sixth Circuit Court of Appeals is wrong.

From this discussion of the *Brewer* case, it seems self-evident that this case should not be followed.

THE ORDER IS TOO BROAD

If this court should hold that the Federal Trade Commission has power to stop the petitioners from shipping punchboards to others who will use them in such a manner as to violate the Federal Trade Commission Act, the order should be modified so that petitioners are not restrained from shipping their punchboards to people who are engaged only in intrastate transactions.

Also, the following portion of the order should be stricken: "* * * or may be used."

Petitioner's authority for this change is the case in this court of *Lee Boyers Candy v. Federal Trade Commission,* 128 F. (2) 261.

THIS PROCEEDING IS NOT IN RESPECT THEREOF TO THE INTEREST OF THE PUBLIC.

They can call them orders to cease and desist, but in reality the orders issued by the Federal Trade Commission are injunctions. Therefore, some of the salutary aspects of the law of injunctions should be given the proper respect in proceeding under the Federal Trade Commission Act when looking forward to the issuing of a cease and desist order.

Injunction proceedings have always been held to be an extraordinary remedy, resorted to only when there is no

other adequate remedy at law or where irreparable injury will result in the injunction does not issue forthwith. Also, injunctions have never been recognized as a proper remedy in criminal law. Under such circumstances injunction proceedings would not be entertained as an indirect proceeding when there is available an adequate and effective direct proceeding, especially when the indirect proceeding is cumbersome, roundabout, expensive, ineffective, and practically a nullity. While, on the other hand, the direct proceeding is inexpensive, straight to the point, and effective.

From the order issued herein the supposed evil that the Commission is endeavoring to eradicate is the use of chance to distribute merchandise. This proceeding is not a direct proceeding against this practice, but is an indirect proceeding against punch boards, not the use of them. It is not even a proceeding against chance itself, but is only against one minor device among numerous chance devices used in the distribution of merchandise, which makes this proceeding ineffectual and practically a nullity.

The present proceeding is only what might be called a declaratory proceeding, for it only declares that the acts proceeded against are in violation of the Federal Trade Commission Act, and thereafter, there must be further proceedings if there is a violation. On the other hand, the states have a direct, inexpensive way of eliminating and eradicating the distribution of merchandise by chance if they choose to do so, and if they do not, the Federal government should not interfere with such local transactions.

This is also true of the situation wherein punch boards are used in assortments, which assortments are shipped in interstate commerce. The Federal Trade Commission by proceeding directly against this practice has been fully successful in eradicating it. There is no need of bringing a proceeding to stop the furnishing of punch boards to people who use them in connection with the violation of the Federal

Trade Commission Act when the direct proceeding against that practice is adequate to stamp it out.

This statement from the first *Raladam* case, *supra,* is injected here:

> "Certainly, it is hard to see why Congress would set itself to the task of devising means in creating administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another."

Why the petitioners inject this quotation at this time is so that they can say:

> "Certainly, it is hard to see why Congress would set itself to the task of devising means and creating administrative machinery for the purpose of conducting cumbersome, roundabout, expensive, ineffective proceedings, when there is a direct, inexpensive and effective remedy available."

There are two prerequisites before the Commission can proceed; first, there must be present either an unfair method of competition or an unfair or deceptive act or practice used in interstate commerce; and second, it must appear that a proceeding by the Commission against the use of the unfair method, act or practice would be in respect thereof to the interest of the public. The public interest present in the Federal Trade Commission Act is limited to the interest the public may have in the elimination of the use of the unfair method, act or practice. If the elimination of the unfair method, act or practice is not to the interest of the public the Commission does not have jurisdiction to proceed, and the complaint must be dismissed. This is true because Congress did not and never intended to give the Commission power or jurisdiction to proceed generally in the interest of the public. The act creating the Commission and giving

it power contains absolutely no substantive words of protection of the public. The only substantive words of protection used in the act are protection against the use of unfair methods of competition and unfair and deceptive acts and practices. The only words in the act concerning public interest are words of limitation upon the Commission's power and are not substantive words of protection.

On this point the Supreme Court in the case of *Federal Trade Commission v. Raladam,* 283 U. S. 643 held unequivocally that the provision of the creative act requiring that proceedings by the Commission must be to the interest of the public is not a part of the substantive protection of the act but is a limitation on the protective power and jurisdiction granted. The court says, page 648:

> "By these additional words, protection to the public interest is made of paramount importance but, nevertheless, they are not substantive words of protection, but complimentary words of limitation beyond the jurisdiction conferred by the language immediately preceding."

A careful reading of the first part of (b) of Sec. 5 of the Federal Trade Commission Act will show that this is the only interpretation that can be given to this part of the act. The act provides on this point as follows:

> "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it *in respect thereof* would be to the interest of the public, it shall issue * * *." (Italics provided).

As it is a prerequisite to the Commission proceeding

herein that this proceeding must be against either an unfair method of competition or an unfair act or practice which it is to the interest of the public to have stopped, we must first determine what unfair act or practice the Commission intends to eliminate by this proceeding and, next, we must determine whether or not this proceeding will effect the elimination.

The unfair act that this proceeding is aimed at is the practice of retailers using chance to distribute merchandise. It follows that the issuing of a cease and desist order against this petitioner herein will not eradicate this unfair act of retailers; therefore, this proceeding is not to the interest of the public and for that reason must be dismissed.

From the very nature of the situation an order against the petitioner will not have any effect upon this unfair act. An analysis of the practice sought to be eliminated will make the truth of this statement obvious. That punch boards are only one of the many chance devices used by the so-called retailers in their obnoxious practice of distributing merchandise by chance is of controlling effect herein. As the retailers use many different kinds of chance devices the elimination of one or even more of these devices will not in any manner decrease the amount of merchandise distributed by chance nor will it decrease the amount of money spent on chance. Consequently, if the Commission were able to prevent completely the retailers from obtaining punch boards the distribution of merchandise by chance would still go on unaffected. The petitioner's case is much stronger than this because the Commission's lack of power to stop the intrastate distribution of punch boards and of all other chance devices prevents it from stopping the retailers from obtaining chance devices. As long as retailers can obtain chance devices or create them they will use chance to distribute merchandise. Therefore, if a cease and desist order should be issued against petitioner the use of chance by retailers to distribute merchandise would go on unaffected.

In addition to the fact that retailers use many different kinds and types of chance devices they have many sources of supply which are not within the purview of the Federal Trade Commission Act. This fact, also, is very important in determining if this proceeding is "in respect thereof to the interest of the public."

The source from which the retailer obtains the chance device he uses or whether it had moved in interstate commerce, or not, has no effect upon the use of it. Whether the chance device came in interstate commerce or from petitioner's factory intrastate in New York, the effect of its operation in New York is the same.

Also, the effect of the use of chance in this regard is the same when a retailer in New York, for illustration, uses punch boards which have been distributed in interstate commerce from which his customers select slips of paper upon which there is a printed number as when the same retailer uses a jar or some other container from which his customers select slips of paper upon which the retailer has stamped a number or when the retailer uses a spindle or a pad upon which a local printer has attached slips of paper upon which he has printed numbers.

This fact is very important herein because it must be conceded that the Commission has no power to prevent the New York manufacturer from supplying the New York retailer with punch boards, nor can the Commission stop the local printer from furnishing the local retailer with pads and spindles, and the Commission is without power to stop the local retailer from making his own spindles, pads or putting slips of paper in a container upon which he has printed or stamped numbers. It must also be conceded that the Commission cannot prevent the said retailers from obtaining all of the other numerous chance devices used by retailers in the distribution of merchandise by chance such as dice, cards and all kinds of slot machines, including the so-called pin ball machines.

From this, it is certain that the stopping of the interstate distribution of punch boards has absolutely no effect upon the use of chance in the distribution of merchandise. Add to this that this proceeding is merely against this respondent, and the futility of this proceeding in regard to to effecting the elimination of the practice of using chances in the distribution of merchandise is made self-evident.

For the reason hereinabove set forth, the petitioner respectfully requests this court to set aside the order issued herein.

Respectfully submitted,

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